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MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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No. 72-1086

DeLONG CORPORATION, and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

v.

STATE OF OREGON, by and through its STATE HIGHWAY COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RESPONDENT respectfully prays that petitioner's petition for a Writ of Certiorari to the Supreme Court of the State of Oregon be denied.

JURISDICTION

Respondent denies that this Court has jurisdiction under 28 U.S.C. § 1257 (3), and contends it should not review the State court judgments below because, in summary: (1) No substantial federal question is involved; (2) no constitutional issues of due process, or otherwise, were timely raised, preserved or presented in the State courts, and (3) the decision below could have and did rest on substantial and sufficient state grounds. These points are more fully discussed below.

QUESTIONS PRESENTED

Respondent believes the statement of "Questions Presented" in the Petition (pp. 2, 3) is argumentative, misleading and inaccurate. From the petition itself, from the portions of the record certified in this proceeding, and from the authorities; it will be apparent that no valid, substantial issue of due process, or any other federal question, exists. Specific, factual flaws in each of Petitioners' four "Questions Presented" include the following:

1. Respondent, the State of Oregon by and through its State Highway Commission, knew nothing of the supposed "relationship." There was no concurrent or continuing "relationship", but only a one-time, arm's length transaction whereby the Trial Judge and his partners purchased land from the State Board of Control, a separate and distinct agency of the State of Oregon. The sale was by sealed bid pursuant to a widely advertised offer to sell. The transaction was concluded and a matter of public record months before this case was assigned to the judge for trial. Petitioners admit that the transaction itself was fair and regular (Pet. p. 7, n. 3);

Petitioners' attempt to disqualify the Trial Judge came more than four years after the trial, nearly eight months after the Court of Appeals of the State of Oregon affirmed the judgment, and after the initial denial of review by the Supreme Court of the State of Oregon.

2. There was no "specific ruling discrediting all of the evidence of Petitioners." In his written opinion, the Trial Judge noted the failure of defendants to call potential witnesses including Colonel DeLong, who was the principal officer of Petitioner DeLong

Corporation and project manager during most of the events in question. The Court noted that failure was:

> ". . . in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party to produce, the evidence offered should be viewed with caution."

The Court's comment was specifically assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

3. The trial judge did not enter "a declaratory Judgment finding Petitioners liable for any damage due to delay incurred by a third party . . ." There was no attempt to adjudicate that anyone was liable to a third party. The Declaratory Judgment entered May 23, 1969 provided:

> "6. As between plaintiff and defendants, any and all delay to United States Steel Corporation, the contractor for the steel superstructure erected upon the substructures which were the subject of the contract between plaintiff and defendant DeLong Corporation, which occurred from and after April 13, 1964, was caused by the fault of defendant DeLong Corporation;"

Such declaration was specificially assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

4. Respondent categorically denies that any of its exhibits were "fraudulently offered and substantially altered." It has not been and cannot be demonstrated that the trial court materially relied on the challenged exhibits. The authorship and identity of the same exhibits were questioned at the trial. Their admission in evidence was specifically assigned as error, on non-constitutional grounds, in Petitioners' unsuccessful appeal in the State courts.

STATEMENT OF CASE

Respondent disagrees with much of petitioners' statement of the case. It is argumentative and in many respects inaccurate and misleading.

By way of background, this case arose from a contract executed on June 29, 1962 between petitioner DeLong Corporation and respondent. Petitioner, The Travelers Indemnity Company furnished the construction bond covering the contract. Under the contract, DeLong was obligated to construct a major portion of the substructure of a bridge across the estuary of the Columbia River at Astoria, Oregon.

In April, 1964, because of failures of DeLong to perform, respondent terminated the contract and subsequently relet the contract to Raymond International, who completed the work.

Petitioners brought an action on the contract against respondent in the U.S. District Court for Oregon. That action was dismissed because of lack of federal jurisdiction in August, 1964. *DeLong Corporation v. Oregon State Highway Commission*, 233 F. Supp. 7, affirmed 343 F.2d 911, cert. denied 382 U.S. 877.

Respondent, on August 30, 1965, by and through its Highway Commission, filed its complaint against petitioners in the Circuit Court of the State of Oregon for the County of Marion.

There was extensive preliminary legal maneuvering with resultant delays. During this period the Astoria Bridge was completed and opened to traffic.

Beginning in November, 1967, there was approximately four and one-half months of intensive discovery and depositions. Petitioners examined voluminous records, diaries, correspondence, maps, plans and other documents from respondent's files. Petitioners deposed in minute detail numerous engineers and employes of respondent. Some individual depositions took two or three days or more.

Just before trial the case was assigned to the Honorable George A. Jones, Circuit Judge. The trial commenced on March 18, 1968 and ran through September 1968. There were over 900 exhibits and over 9,000 pages of testimony.

On January 31, 1969, the trial court, by memorandum opinion, entered its findings in favor of respondent. That opinion is set out in the petition herein (Pet. pp 3a-7a). Judgment was entered on May 23, 1969.

Petitioners appealed from the judgment. The case moved through the Oregon Court of Appeals and the Oregon Supreme Court at a "snails pace". Petitioners obtained extensions of time at virtually every procedural step. On December 12, 1972, the Oregon Supreme Court entered its final order in this case refusing to grant defendants' (Petitioners here) "Supplemental Petition for Reconsideration of Petition for Review."

Thereafter, petitioners commenced this proceeding. They also filed in the U.S. District Court for Oregon a separate equitable proceeding to permanently enjoin the enforcement of respondent's state Court Judgment, and

also asked for a temporary injunction to restrain enforcement of said judgment pending litigation. Petitioners have appealed to the Ninth Circuit from the trial Court's order denying the temporary injunctions.

In their statement of the case petitioners inaccurately portray the circumstances of the land transaction between the Oregon Board of Control and the Trial Judge and his partners.

The Oregon Board of Control is made up of the Governor, the Secretary of State and the State Treasurer, the three principle elected officers in Oregon. Among its duties, the Board administered the State's penal and mental institutions, as well as the deaf and blind schools and the State T.B. Hospital.[1] The Board, on the advice of its staff and its "Land Use Committee" decided to sell the Colony Farm which had become surplus to the needs in the State. See Affidavit of Carl A. Haugerud (Infra pp. 3-A–5-A).

An appraisal was obtained from the Oregon Department of Veterans' Affairs. The staff appraisal dated July 28, 1965, reported the value of the Colony Farm at $175,000. See Affidavit of appraiser Don J. Mason, (Infra pp. 6-A–7-A).

Between August 17, 1965 and February 16, 1966, after advertising in newspapers in Los Angeles and San Fran-

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[1]The functions of the Board of Control are entirely different and separate from those of the Highway Commission. *DeLong Corporation v. Oregon State Highway Commission, supra,* 233 F. Supp. 7 (D.C. Or. 1964) contains a good discussion of the history, composition and functions of the Highway Commission. *Potter v. McCall,* 433 F.2d 1087 (9th Cir. 1970) discusses to a lesser degree the functions of the Board of Control. Also see Affidavit of Carl A. Haugerud (Infra pp 3-A–5-A).

cisco, California, Portland, Salem and Dallas, Oregon and in farm papers in five Northwestern States; the Board of Control on three occasions attempted to sell the Colony Farm. The minimum price on all occasions was $175,000, but the terms of payment were liberalized on the subsequent attempts and sealed bids were again solicited.

No bids were received on the first two occasions, and only one bid by Green Villa Farms on the third occasion. On February 16, 1966, the Colony Farm was sold on Land Sale contract to that company for $175,000. In July, 1967, the State was paid off in full on its contract. (Pet p. 21a) Also see Affidavit of Carl A. Haugerud, (Infra pp. 3-A–5-A).

Contrary to statements in petitioners' brief, Judge Jones had nothing whatsoever to do with this case until it was assigned to him for trial during the first or second week in March, 1968.

Presiding Judge Val D. Sloper presided over all preliminary legal matters prior to trial that commenced on March 18, 1968. Because the attorneys estimated that the trial would last four to six weeks or longer, Judge Sloper could not personally be involved in the trial of the case. He assigned it to Judge Jones for trial. See Affidavit of Honorable Val D. Sloper (Infra pp. 1-A–2-A).[2]

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[2] The affidavits of Judge Sloper, Don J. Mason and Carl A. Haugerud are reproduced in the Appendix from the record in the related case, *DeLong v. Hon. Lee Johnson*, Civil Case Number 73-20, U.S. District Court for Oregon.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

I. No Substantial Federal Question is Involved.

It is believed apparent that "Questions Presented" Nos. 2, 3 and 4, as stated by petitioners (Pet., pp. 2, 3) do not involve any constitutional issues. These deal, respectively, with (2) the right of a state judge, sitting as the trier of fact, to weigh the evidence in accordance with recognized rules; (3) the scope of declaratory relief between the immediate parties to a declaratory action tried in State courts under State law, and (4) the application of ordinary rules of evidence in a State court civil action. All three are basically local matters for the state courts and the state legislatures.

Each of these asserted errors was fully submitted to the State appellate courts, duly considered, and rejected. No constitutional grounds were urged there. Documentation of these statements as to each of petitioners four questions will be hereinafter set out.

Petitioners' Question No. 1, relating to the trial judge's non-disclosure of a supposed "relationship" with Respondent, has been *artfully but unconvincingly contrived* to suggest that this Court should perceive and rule upon an issue of constitutional magniture, relating to the right to a trial before an impartial tribunal. No authorities have been cited which suggest that the actual facts of this case give rise to a constitutional issue. The merits of the claim hereinafter discussed discloses that no substantial issue, either state *or* federal exists.

Petitioners objection to the supposed "relationship" was first raised in Petitioners' "Supplemental Petition for Reconsideration of Petition for Review, filed in the Oregon Supreme Court on December 1, 1972. To the extent that specific grounds were there assigned, it appears possibly that Petitioners' intended to rely upon both state and federal grounds.[2]

This Court has recognized that a constitutional issue first raised in a petition for rehearing in a state appellate court comes too late, and such issue will not be reviewed here. *Hanson v. Denckla*, 357 U.S. 234, 243, 244, reh. den. 358 U.S. 858 (1958); *Radio Station WOW vs. Johnson*, 326 U.S. 120, 128 (1945).

Here, the so-called constitutional issue relating to the Judge did not surface until after the State Court of Appeals affirmed the trial court judgment and denied a rehearing, the State Supreme Court denied a petition for review, and the petitioners filed a petition for reconsideration. Only then, in a last-ditch "Supplemental Petition for Reconsideration of Petition for Review" did petitioners suggest that the undisclosed "relationship"

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[2] For example, they urged: "It [the trial courts failure to disclose] thus vitiated the entire trial proceedings *and* such failure effectively deprived petitioners of the exercise of their sacred and constitutional right to be assured of a fair and impartial judge." (Supp. Pet., p 7, emphasis added.) "The law in this State and the interpretation of the constitutional right to a fair and impartial trial and due process of law by this Court and the Supreme Court of the United States would have required Judge Jones to grant Counsel's Motion [to disqualify the Judge]." (Supp. Pet., P. 8.) After citing the Code of Justinian and various Oregon decisions and statutes, petitioners urged that the trial judge ". . . would have been disqualified by the filing of the affidavits of prejudice, as a matter of law." (Supp. Pet., P. 10.)

had, more than four years earlier, deprived them of due process.

II. **No Constitutional Issue was Timely Raised, Preserved or Ruled upon in the State Courts.**

The petition for Certiorari herein does not state when in the trial court or in the appellate court, or how the supposed federal questions were raised, as required by Rule 23 (1)(f) of the Rules of this Court. Such omission, we suggest, was not inadvertent, but necessary because in fact they failed to raise any such questions in the trial court, in their lengthy (325 page) Appellant's Brief in the State Court of Appeals, or even in their Reply Brief in that Court.

For the convenience of this Court, we have reproduced in the Appendix (Infra, pp 16-A–26-A) several pages from the Table of Contents and the entire Index of Authorities from the Appellants' Abstract of Record and Brief, filed by Petitioners in the State Court of Appeals. *None of the 17 Assignments of Error, as there summarized, raise any issue of "due process," and no constitutional provisions, either state or federal, are cited or relied upon.*[1]

In connection with petitioners' failure to raise constitutional issues we call the Court's attention to pertinent portions of the Record.

In the State Court of Appeals, there was no error

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[1] Respondent has also filed a praecipe in the Supreme Court of Oregon and in the Court of Appeals of Oregon designating for inclusion in the record of this Court all of the printed briefs filed in those courts.

assigned, or issue raised, with respect to the integrity of the Trial Judge, of any nature whatsoever. That matter is now the subject of Petitioners' Question No. 1 (Pet. p. 2).

As to Question No. 2, the trial court's observation on their failure to call available witnesses (Pet. p. 3), that observation was the subject of Assignment of Error No. 8 in the Court below. The text of that Assignment with supporting argument is found on pages 207-211 of Petitioners' principal brief below. It was answered by Respondent on pages 90-93 of its brief and replied to by Petitioners in their Reply Br., pp. 53, 54. Aside from a passing reference to a "basic constitutional right" in the Reply Brief (P. 54), there is no suggestion of any federal question.

As to Question No. 3, relating to the scope of declaratory relief (Pet., p. 3), the same basic question was the subject matter of their Assignments in Error Nos. 10 and 11 below. These assignments with supporting argument are found at pp. 229-240 of Petitioners' brief below. Respondent answered the assignments at pp. 99-104 of its brief, and petitioners replied at pp. 63-74 of their reply brief. No "constitutional" or other federal right was relied upon.

Question No. 4 (Pet., p. 3) challenges the admission in evidence of two exhibits, identified as Ex. 113 and 488 (See Petition, pp. 30-33). The same basic objections as to authorship and supposed alterations as are raised here, were argued in the trial court and raised in Assignments

of Error 3 and 5 below. The pertinent Assignments and supporting arguments are at pp. 159-162 and 171-147. (Ex 113), and pp. 191-199 (Ex 488) of Petitioners' brief below. Again, Respondent answered (pp. 72-76; 86-88) and petitioners replied (pp. 49, 50; 52, 53). Aside from one reference to a "constitutional right of cross-examination" (App. Br. 197), a right no longer relied upon, there is again no suggestion of a federal constitutional issue.

The opinion of the Oregon Court of Appeals, *DeLong Corporation v. Oregon State Hwy Com.*, — Or App —, 495 P2d 1215, 94 Or Adv. Sh 983 (1972), contains no discussion or decision of any issue of due process, or of any other federal question.

This Court has held that only constitutional issues raised in the lower courts are before it for review. *Shelley v. Kraemer*, 334 U.S. 1, 8, 9 (1948).

Here, none of the four "Questions Presented" were suggested as sources of any due process issue either in the trial court or by Assignment of Error in the Oregon Court of Appeals.

In their Petition for Rehearing filed in the Oregon Court of Appeals, Petitioners first suggested that the trial court's observation on their failure to call available witnesses involved rights of ". . . due process of law under the constitutions of the State of Oregon and of the United States." (p. 5;). The argument in support of that contention cites no specific provision of either constitution or, indeed, any authority other than one Alaska state

court decision (pp. 25, 26). That argument, with vague constitutional overtones, was repeated in the original Petition for Review filed in the Oregon Supreme Court (pp. 48-50).

Otherwise, none of the four "due process" questions were raised as such until, as previously noted, petitioners belatedly raised the "judge" issue in their "Supplemental Petition for Reconsideration of Petition for Review."

It is fundamental that this court lacks jurisdiction on certiorari to review a federal question not raised, briefed or argued in the state courts. *Hill v. California,* 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

It is also the rule, at least in civil cases arising in State courts, that a federal question first raised on an application for rehearing in State appellate courts comes too late, and will not be reviewed here. *Hanson v. Denckla,* 357 U.S. 235, 243, 244, reh. den. 358 U.S. 858 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945).

If ever there was a case which warranted a denial of certiorari solely because the supposed federal questions were not timely raised and preserved, this is the case.

As outlined in the Statement of the Case (supra, pp 4–7), this case involves events occurring principally from 1962 to 1964. The action was commenced in 1965, involved extensive motions, amendments to pleadings and discovery, and finally came to trial in the spring of

1968. Reduced to essentials, the subject matter was conflicting claims of breach of contract.

The trial extended over a period of six months, and included over 9,000 pages of testimony and some 900 exhibits. Testimony was concluded in September, 1968, and the experienced Trial Judge considered the matter, presumably weighing the mass of evidence, until January 31, 1969, when he issued his well-reasoned opinion, including findings. The formal judgment was entered May 23, 1969, and an appeal followed. Lengthy briefs were filed in both sides, with numerous extensions of time, and oral arguments before the Court of Appeals were held on September 27, 1971. That Court affirmed the judgment in all respects on April 7, 1972.

Petitions and Supplemental Petitions for rehearing, review and reconsideration by the Oregon appellate Courts followed, and the last of these was denied December 12, 1972. *We repeated the foregoing to emphasize the magnitude of this case and the time and the "blood, sweat and tears" heretofore expended.*

After the protracted history of the case petitioners seemingly desire that this Court undertake to review the evidence (see Pet., pp. 29-33), or at least remand the cause of the Oregon Courts to start all over again. Such a result, we submit, should not occur without the clearest and most compelling of grounds.

As noted above, it was not until December 1, 1972, in their "Supplemental Petition" to the Supreme Court of Oregon, that petitioners raised the issue relating to

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alleged grounds for disqualification of the trial judge. Even the petitioners seem to concede that their other points are not of independent concern to this court.[6]

They suggest that they did not discover the supposed relationship until sometime in 1972, when an investigator was employed. See the Affidavit of Mr. Cheasty, (Pet., p. 12a). The exact date of his employment is conspicuously absent, but the dates given strongly suggest that this was not until after the Oregon Court of Appeals' decision on April 7, 1972.

Why petitioners should suddenly decide to employ someone to "investigate the genuineness of certain documents and to do other factual research" (Pet., p. 12a) years after the trial and probably after the judgment was affirmed, is not explained. The lack of explanations is especially significant, since counsel ". . . *had serious doubts, beginning when there Exhibits . . . were introduced, as to the validity of their identification and as to their origin and identity.*" (Pet., p. 31a).

Against this background, the belated assertion of supposed violations of due process rights smacks of ". . . baseless, harassing or vexatious litigation in court after court by a disappointed litigant," of which petitioners "doth protest too much" their innocence (Pet., p. 4).[6]

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[6] "The other errors of the trial court discussed herein emphasize the denial of due process of law suffered by Petitioners." (Pet., p. 34).

[6] The records of this Court will show thaat Petitioners also filed two Notices of Appeal to this Court, and unsuccessfully applied to Justice Douglas for a stay of execution, pending the proceedings on

If, as petitioners seem to imply, the decision of the trial Court could only result from bias on the part of the judge, why did they wait until four years after the trial to investigate and discover the supposed relationship? As shown by the documents reproduced in the petition, the transaction to which they object was concluded and a matter of public record no later than July 5, 1967 (Pet., p. 16a), nearly nine monthe *before* the trial started.

Respondent submits that there is not now and never was a significant federal question in this case, and that if there had been, the failure to raise and preserve it below is sufficient reason, under established principles, for this Court to refuse to review the matter.

III. The State Court Decision Rested on Substantial and Sufficient State Grounds.

It is also established doctrine that this Court will review a state Court's decision only when it appears that a federal question was presented to the highest state Court having jurisdiction, and that its decision on the federal question was necessary to its determination of the cause. Where the decision might have been on a substantial and sufficient state ground, this Court will not undertake to review it. *Durley v. Mayo*, 351 U.S. 277, reh. den. 352 U.S. 859 (1956); *Dixon v. Duffy*, 342 U.S. 33 (1951); *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945).

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appeal and/or certiorari. Similar application was made to and rejected by the state Circuit Court. As noted above, a separate suit to permanently enjoin Oregon's Attorney General from enforcing the judgment is pending in U. S. District Court for Oregon (See Pet., p. 5, n. 2). An appeal from the District Court's denial of a preliminary injunction is now pending in the 9th Circuit.

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Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain the judgment, this Court will not take jurisdiction. *Lynch v. New York,* 293 U.S. 52, 54 (1934).

When the highest court of a state has failed to pass upon a federal question, it will be assumed that the omission was due to a want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. *Street v. New York,* 394 U.S. 576, 582 (1969).

There principles would also bar review by this Court, even if the presentation of a federal question below should be deemed sufficient.

It seems self-evident that petitioners "Questions Presented" Nos. 2, 3 and 4[7] were indeed decided on substantial and sufficient state grounds. Moreover, all of the matters involved in Questions Nos. 2, 3 and 4 were thoroughly briefed, argued and determined primarily or exclusively on the basis of traditionally state-law arguments.

Because of its late appearance, it might be argued that Question No. 1, relating to the supposed "relationship"

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[7] These are the questions involving, respectively, the "weaker and less satisfactory evidence" rule, the scope of declaratory relief, and the admissibility of certain exhibits. Petition, p. 3.

between the trial Judge and Respondent, was necessarily decided by the Oregon Supreme Court on a federal due process basis. That Court issued no written opinion in refusing to review the Court of Appeals' decision.

However, Respondent submits that the "judge" question could have been and presumably was based on adequate state grounds.

Petitioners related complaint in the U. S. District Court referred to above includes all of the material set out in the appendix to the petition here. That material strongly implies irregularity by the state Trial Judge and/or the Board of Control.

During oral argument on petitioners' motion for a temporary injunction, when pressed by the Federal Trial Judge, Petitioners' counsel retreated to admit that they claimed no irregularity in the land transaction or at the trial. Moreover, in the ruling from the bench denying the temporary injunction, *the court found that petitioners had admitted during arguments on the motion, that the State Trial Judge had not been biased or prejudiced.* Portions of the proceedings and the courts ruling are set out in the appendix, (Infra, pp. 27-A–35-A).[6]

Petitioners argument, then, is that under the Oregon

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[6] Perhaps it is relevant here to direct the courts attention to *Lord Brothers v. State Highway Commission*, Marion County Case No. 62911, which involved a highway construction contract dispute. Judge George A. Jones presided over a 10 day trial beginning December 4, 1967. On January 17, 1968, Judgment was entered awarding the Plaintiff Contractor $38,207.88 in damages (with interest) against the State. This case was tried after the "land transaction" and before the DeLong case.

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statutes (ORS 14.250; 14.250; Pet. pp. 50a, 51a), they were entitled to a change of judge upon the mere assertion of a belief of prejudice, by means of the statutory affidavit. If, as the federal court, found, petitioners admitted that the trial judge was not actually biased or prejudiced, they must mean that upuan a *ex post facto* showing of facts which they now say would have caused timely affidavits of prejudice to be filed, they are entitled to a new trial *even though they concede that there was no actual bias or prejudice against them*: Such a contention defies logic and is not supportable under State law.

Even under Oregon's liberal statutes, a litigant is not entitled to a friendly judge, but only to one who is impartial. *Archerd v. Burk*, 148 Or. 444, 451, 36 P2d 338 (1934).

Although a motion for change of judge may be allowed without establishing any actual prejudice on the part of the judge, if the affidavit is challenged it is still necessary to make a showing that the belief of prejudice is asserted in good faith. *State ex rel Lovell v. Weiss*, 250 Or 252, 430 P2d 357, 422 P2d 241.

The petitioners would have this Court hold that they are entitled to relief when they seek to disqualify the Judge for no reason at all, long *after* he decides the case against them.

Former Oregon statutes which provided for disqualification of a judge without cause were held unconstitutional, as being in violation of the principle of separation

of powers declared in Art. III, § 1 of the Oregon Constitution. *State ex rel Bushman v. Vanderberg*, 203 Or 326, 341, 280 P2d 344 (1955).[9] Obviously, the Oregon Supreme Court may very well have analyzed the "judge" issue in a similar way, and rejected it on purely state grounds.

There are other adequate state grounds to support the decision on this point. For one thing, the Oregon statutes provide in part that an affidavit of prejudice shall be filed:

> ". . . in contested cases before or within five days after such cause . . . is at issue upon a question of fact or within 10 days after the assignment, to preside over such cause . . .". (ORS 14.260; see Pet., p. 51a)

Or, in counties where there is a presiding judge, the motion and affidavit shall be filed at the time of the assignment of the case to a judge or:

> ". . . not later than the closing of the next judicial day; but no motion to disqualify a judge to whom a case has been assigned for trial shall be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause . . .". (ORS 14.270; see Petition, p. 52a)

The "timely filing" provisions of these and predecessor statutes are construed to mean what they say, and a party who attempts to disqualify a judge too late will be barred from doing so. *Merimac Co. v. Portland Timber*, 259 Or 573, 575; 488 P2d 465 (1971); *State v. Little*, 249

[9] Even in states allowing each party a preemptory challenge to a judge, it is recognized that such "right" is a matter of grace to be distinguished from a disqualification for cause. *Hickey v. Superior Court*, 505 P2d 1086 (Ariz. App. 1973).

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Or. 297, 303, 431 P2d 810 (1968), cert. den. 390 U.S. 955, (1968); *Rex Mtge. Loan Co. v. Stanfield*, 194 Or. 698, 244 P2d 173 (1952); *Mursener v. Redding*, 176 Or. 617, 628, 160 P2d 307 (1945); *Phy v. Allen*, 115 Or 168, 173, 236 P. 1056 (1925).

Certainly the Oregon Supreme Court was following Oregon law in rejecting Petitioners' attempt to disqualify the trial judge where the attempt was made after the case was tried, decided adversely to Petitioners, and affirmed on appeal.

Petitioners' attempt to avoid the requirement of timeliness of the basis of newly discovered facts will not bear scrutiny where they have offered no explanation whatever for the long delay in discovering the facts disclosed by public records.

Oregon law is that a party is chargeable with knowledge of matters of public record. See, e.g., *Kernin v. City of Coquille*, 143 Or 127, 136, 21 P2d 1078 (1933).[5] Thus, petitioners were chargeable with knowledge of the facts regarding the "relationship" at the time the case was assigned to Judge Jones for trial, and there can be no excuse for waiting until after an adverse decision, to try to disqualify the Judge on the basis of those facts.

Numerous other courts, both state and federal, have recognized the general principle that a party seeking to

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[5] The affidavit of Mr. Cheasty, Petitioners' investigator discloses that substantially all of the facts regarding the "relationship" were found in the Deed and Mortgage records of Polk County, Oregon, the minutes of the Board of Control of the State of Oregon, and assumed business name records. The latest recording date mentioned was July 5, 1967. (Pet., pp. 12a-17a).

disqualify a judge is obligated not only to act promptly upon discovery of the facts, but to exercise reasonable diligence in discovering the facts upon which they rely in charging bias as prejudice. See, for example, *Mayo v. Beber*, 177 Cal App. 2d 544, 2 Cal. Rptr. 405 (1960); *Aaberg v. District Court*, 136 Colo. 525, 319 P2d 491 (1958); *Silas v. Proctor Coal Co.*, 272 Ky. 477, 144 SW 2d 749 (1938); *Johns Hopkins University v. Hutton*, 316 F. Supp. 698 (D.C. Md. 1970); *United States v. Hoffa*, 245 F. Supp. 772 (D.C. Tenn. 1965).

In *United States v. Hoffa, supra*, defendants had been convicted of a crime, and the conviction affirmed on appeal. In moving for a new trial and for disqualification of the original trial judge, defendants relied on affidavits obtained some 18 months after the trial, and a few days after the affirmance on appeal. Although there were also other grounds for denying the motion, the following remark of the Court is apposite:

> "In this case there is a total lack of showing of any facts upon which diligence might be inferred. *The same diligence which produced the affidavit within a few days after affirmance of the defendants' convictions upon appeal could doubtless have produced it at any other time.*" 245 F. Supp. at 776. (Emphasis added)

The petitioners' argument about the supposed relationship were very probably rejected by the Oregon courts on the basis of State law. Their arguments on the other points raised here should, *a fortiori*, be regarded as rejected on state grounds below. No federal question having been necessarily passed on below, there is no

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federal question to be reviewed here, under the decisions of this Court discussed above.

IV. Aside from Jurisdictional Considerations, There Was No Disqualifying Relationship Between the Trial Judge and the Respondent.

We have heretofore discussed in detail the advertised public sale of the Colony Farm by the Board of Control at its appraised value. (Supra pp. 6–7) We reiterate that the sealed competitive bid by Judge Jones and his partners was the only bid received by the State. (Supra, p 7).

Petitioners claim that Judge Jones and his partners achieved a 50% increase in the average value of the purchased land (pet. p. 7). They then generously proclaim that they are not implying that the judge received a windfall (Pet. p. 7, n. 3).

An examination of the above claim illustrates the tenuous nature of petitioners reasoning and logic. Mr. Cheasty in his Affidavit calculates that Mr. Mason's July, 1965 appraisal reflects an average sales price of $421 per acre. He next reports, based on undisclosed reliable information, that Prudential Insurance Company had a June or July 1967 appraisal averaging $650 per acre on all of the land owned by Green Villa Farms.[9] The name of the appraiser is not disclosed. (Pet. 17a).

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[9] The Colony Farm contained approximately 754 acres of which 416.3 acres were non-tillable. (Pet. p. 16a) Mathematically the above referred to mortgage loan appraisal would include approximately 1850 acres at the claimed rate per acre. Nothing in petitioners affidavits disclose whether the other land owned by Green Villa Farms was similar to the Colony Farm.

Immediately one perceives that there is two years between the appraisals. Mathematically, the increase in land value under petitioners illusory formula would be 25%, not 50%. Moreover, *we submit that a subsequent appraisal by an undisclosed appraiser for a different purpose (mortgage loan) of a substantial different overall acreage is meaningless. There was no sale or other transaction to illustrate a value change.*

We have discussed the background and circumstances of the "land transaction" in detail as a preface to discussing petitioners legal authorities. Petitioners report "recent and controlling decision of this Court" to be: (Pet. p. 14) *Commonwealth Coatings Corp. v. Continental Gas. Co.*, 393 U.S. 145; *cf. Ward v. Monroeville*, decided November 14, 1972, 93 S. Ct. 80; *Tumey v. Ohio*, 273 U.S. 510.

The older cases are readily distinguishable. The *Tumey v. Ohio* case involves a situation where the mayor of the city served as the Trial Judge in a "mayor's court" and was compensated by the number of convictions obtained. The case held that a trial in such a court did not give a defendant convicted of boot-legging due process of law.

Ward v. Monroeville extended the *Tumey* doctrine to a situation where the Mayor served as a Trial Judge but was not paid on a per case basis. The defendant was tried and convicted for traffic violations. The opinion held that because the Mayor was responsible for the finances of the City,(which included substantial sums

in traffic and other fines, due process required a different impartial judge.

We submit that the continuing direct and existing conflict of interest of a Mayor serving as a Trial Judge under those circumstances is completely different from the circumstances of this case.

The *Commonwealth Coatings Corp.*, case, *supra,* is also distinguishable on the facts. In that case the plaintiff subcontractor sued the prime contractor's surety. The matter was submitted to arbitration under the Federal Arbitration Act. Each party selected an arbitrator and they selected a third. The third arbitrator was a consulting engineer that had *irregular but repeated business* with the defendant, and had received fees totalling $12,000 over four or five years. The business relationship had been dormant for about a year, but apparently, had not been terminated. This business relationship with the defendant was not disclosed to the plointiff. This Court set aside the arbitration.

The facts of the *Commonwealth* case are distinguishable from this case in many respects including the following:

1. *Identity of Parties.* There the arbiter' relationship was directly with the defendant. Here the land transaction was not with the Respondent, but was with the State Board of Control, a different entity.

2. *Basic Nature of the Relationship.* The arbitrator had a continual, if intermittent relationship with the defendant, which apparently was dormant, but open. In this case there was a single arms-length transaction that had been closed and completed.

3. *Type of Contact.* The arbitrator as a consulting engineer would, of necessity, become involved with the operational affairs and personnel of the defendant. In this case the basic necessary contact was the submission to the Board of Control of a sealed bid to purchase the Colony Farm.

4. The element of advertising and competitive bidding, an important part of public contracting and the sale of publically owned surplus property, was not involved in the *Commonwealth* facts.

The two other cases cited by petitioners, *Carr v. Fife*, 156 U.S. 494; and *Texaco Inc. v. Chandler*, 354 F.2d 655, cert. denied, 383 U.S. 936, as implied by petitioners, are not too applicable or helpful in this case.

Interestingly in the *Carr v. Fife* case, this Court held that the fact the Trial Judge had represented some of defendants in unrelated matters prior to his appointment to the bench did not disqualify him from trying the case, and that the trial judge must be permitted to decide for himself whether or not to trye the case.

In that case, the Motion to Disqualify was made prior to trial. The opinion does not reveal the length of service of the Trial Judge prior to the subject litigation.

We have heretofore discussed the substantial and unexplained lack of diligence on the part of petitioners in investigating and discovering the relationship between the Trial Judge and the State Board of Control (Supra, pp. 14-16). We reiterate that petitioners' lack of diligence is an important factor for direct consideration by this Court in determining whether to grant certiorari. It is also obviously important in deciding whether or not the judgment is supportable on State grounds.

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V. **Aside from Jurisdictional Considerations, There Was No Error in the Trial Court's Recognition That Petitioners Failed to Call Potential Witnesses.**

As has been noted, petitioners' Question No. 2 urges, in effect, that they were necessarily deprived of due process rights "guaranteed by the 14th Amendment" because the trial Court, in its written opinion, remarked upon their failure to call potential witnesses, including Colonel DeLong.

> ". . . in face of the general rule that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party of produce, the evidence offered should be viewed with caution." (Pet. Question No. 2, p. 3; Trial Court's Opinion, pp. 3a, 5a).

Col. L. B. DeLong testified on deposition that he was the principal shareholder and president of DeLong Corporation, and was superintendent or project manager on this job from the time of George Bauer's death in May, 1963 (Ex. T-15, pp. 25, 56; See Resp. Br. p. 20) Petitioners in the State Trial Court did not present testimony by their second-level people, the formen and inspectors in charge of the DeLong crews and the work.

As noted above, the same comment was the subject of their Assignments of Error No. 8 in the Oregon Court of Appeals. In that Assignment, no "due process" or other federal question was asserted. (Supra, p. 11)

In responding thereto, Respondent pointed out among other things that Colonel DeLong's deposition was received in evidence and presumably considered, that the

Court's remark merely reflected a statutory jury instruction,[12] and that the Colonel could have testified on various pertinent matters not touched upon during his deposition (Resp. Brief, pp. 90-93).

Under Oregon law the same concept incorporated in the jury instructions is properly applicable when the Court, rather than a jury, is weighing the evidence. *Olds v. Van der Hellen,* 127 Or 276, 287, 263 P 907, 270 P. 497 (1928); *See also: Old Colony Insurance Company v. S. S. Southern Star,* 280 F. Supp. 189, 191 (D.C. Or., 1967), where the Court observed:

> "Such testimony would seem to be readily available to carrier and in the absence thereof or a reasonable explanation as to why it was not taken the Court can and does infer that it would have been unfavorable."

Respondent submits that any trier of fact, whether judge or jury, might with good reason find it remarkable that when a corporation is a litigant in a multi-million dollar action, its principal officer, with personal knowledge of the many materal facts, would not be called as a "live" witness.

There was no error in the trial Court's remark directed toward the weight of the evidence, under state law, and no federal question is presented.

VI. Aside From Judicial Considerations, There Was No Error in the Declaratory Relief Granted.

In support of their Question No. 3 (Pet., p. 3), petitioners seem to urge that they were improperly held

[12] ORS 17.250 (6) and (7), is reproduced in the Petition, (p. 53a-54a).

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liable to a non-party (Pet., pp. 2325). This is not the case at all.

Respondent's complaint insofar as pertinent to this point, alleged in substance that DeLong breached its contract by abandoning and failing to complete the work; that U. S. Steel Corporation, another contractor, has asserted a claim that as a result of the delay in completing the piers (under petitioner DeLong's contract), it has suffered delay damages in completing the superstructure, and that plaintiff (respondent here) was contractually liable for such delay damage. It was further alleged that under quoted provisions of DeLong's contract, DeLong was responsible for any loss suffered by other contractors on account of interference, untimely completion, or other cause. (Supp. Ab. 151-153).

The pertinent part of the prayer was for a declaration that *as between the parties,* plaintiff was not liable to U. S. Steel for any such delay damages rested upon defendants, who should indemnify plaintiff on account thereof (Supp. Ab. 154, 155).

There was no dispute as to U. S. Steel's assertion of such a claim, or as to the pertinent contract provisions relating to interference with the operations of other contractors. The trial Court found that DeLong breached its contract in failing to complete the piers, that the State's cancellaion of the contract was valid and proper, and that ". . . any delay from the date of cancellation caused to the United States Steel Corporation, the successful bidder for the superstructure, is the fault of the Defend-

ant and the Court so declares." (Ab. 22-25; Pet., p. 4a, 7a).

The formal Declaratory Judgment on this aspect of the case declared that:

> "6. As between plaintiff and defendants, any and all delay to United States Steel Corporation, the contractor for the steel superstructure erected upon the substructures which were the subject of the contract between plaintiff and defendant DeLong Corporation, which occurred from and after April 13, 1964, was caused by the fault of defendant DeLong Corporation;" (Ab. 73)

Thus, there was no adjudication that U. S. Steel suffered any delay, or sustained any damage, or that if so anyone was liable therefor. The issue of responsibility for delay in completing the piers was part and parcel of this action, and the trial Court's declaration regarding U.S. Steel merely reflected its adjudication of the dispute between the immediate parties.

Assuming, *arguendo,* that U.S. Steel will assert collateral estoppel against Petitioners (See Pet., p. 25, n. 18); it is evident that U.S. Steel would in any event still have to prove that it was in fact delayed, that the cause of the delay to it was the delay in completion of the piers, and that it was damaged as a result.

If collateral estoppel is available to U.S. Steel at all, (an issue obviously not before this Court), the only factual defense of which DeLong might be deprived would be that it was the State's fault completion of the piers was delayed after April 13, 1964. If U.S. Steel sought to recover for delays prior thereto, even the

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"State's fault" defense would be available as to any such delays.

Since the question of responsibility for delays in the pier completion was in issue in this case, there was certainly no error in an express declaration that as between the immediate parties, DeLong was at fault with respect to delays after a designated date, and hence responsible for any loss which U.S. Steel might be able to prove was suffered as a result of those delays in the pier contract. No judgment for or against U.S. Steel was sought or granted.

Here, again, Petitioners raised the same point, without constitutional embellishments, as the subject of their Assignments of Error Nos. 10 and 11, in the state Court appeal (App. Br. 229-240) respondent fully answered (Resp. Br. 99-104), and the Oregon Court of Appeals found it unnecessary to specifically discuss this point. At the conclusion of an opinion running to 21 pages in the Pacific Reporter, in which the Court carefully considered the major points on the appeal, it was said:

> "We think the trial court made findings concerning every material fact necessary to its determination of the issues before it and to support its conclusions of law based thereon. The law requires no more. These findings are amply supported by the evidence.
>
> "Discussion of the remaining assignments of error, whether on the appeal or on the cross-appeal, would add only prolixity to this opinion. We conclude that they are without merit." 495 P 2d at 1236.

The same essential objection now raised here with respect to the declaration regarding U.S. Steel's claim

was one of the "prolixity-adding" contentions the Oregon Court found to be "without merit," and it deserves a similar fate at the hands of this Court.

VII. Aside From Jurisdictional Considerations, There Was No Error and Certainly No Fraud in the Admission of the Challenged Exhibits.

Question No. 4 attempts to raise a due process issue with respect to the introduction and supposed reliance upon "exhibits fraudulently offered and substantially altered." (Pet., p. 3)

In their Statement of the Case[8] petitioners refer to "extrinsic fraud" (Pet., p. 10), and undertake to re-argue the weight of the evidence, particularly with respect to Plaintiff's Exhibits 113 and 488 (Pet., pp. 11-13).

In their argument, petitioners suggest that the trial Court's conclusion on a key factual issue, the cause of defective concrete seals, could only have been based on these two exhibits (Pet., p. 30).

First respondence categorically denies that there was any fraud in connection with these or any other of its exhibits. The charge of fraud, like the "due process" issue, was not timely raised below and comes too late in a Petition for Certiorari to this Court.

Next, we repeat that the authorship and identity of numerous exhibits, including Exhibits 113 and 488, were challenged in the trial Court and on appeal. Pertinent

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[8] "A concise statement of the case containing the *facts* material to the consideration of the questions presented" Rule 23, par. 1(e), Supreme Court Rules, emphasis added.

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references to the briefs below appear above (supra, pp 11-12) and will not be repeated here.

Next, there was a wealth of evidence to support the trial court's findings as to the causes of the defective concrete, and Petitioners' claim that the decision is supported only by the two challenged exhibits rests on nothing but Counsel's conjecture and argument. In view of the extent of the evidence bearing on this question, the claim is patently absurd.

We deem it inappropriate to re-argue the facts of the case here, but include a summary of the evidence on this point in the Appendix (Infra, pp. 8-A–15-A reproduced from pages 25-30 of Respondent's Brief below).

To the extent that the trial Court's opinion indicates what specific evidence was deemed persuasive on the issue of causes of the defective concrete seals, it appears that the Court's primary reliance was on expert testimony (Ab. 23; Pet., p. 5a), rather than on any particular exhibit or exhibits.

Even if the challenged exhibits were erroneously admitted, under Oregon law it is presumed that in non-jury case, receipt of inadmissible evidence was not prejudicial. *State v. Carnathan*, 2 Or. App. 67, 465 P2d 899 (1970); *Lehahan v. Leach*, 245 Or 496, 500, 422 P 2d 683 (1967); *Bakkensen v. John Hancock M. Life Ins. Co.*, 220 Or 484, 494, 353 P2d 558 (1960). Petitioners here have failed to and cannot overcome that presumption.

Petitioners apparently would have the Court regard the reports of their Questioned Documents Examiner

(Pet., pp. 33a-49a) as newly-discovered evidence, or the like. Mr. Rand, of their attorneys, candidly admits in his affidavit that "We had serious doubts, beginning when these Exhibits 113 and 488 were introduced, as to the validity of their identification and as to their origin and identity." (Pet., p. 31a). Why, in that event, he waited until 1972, four years after the trial, to employ an investigator "to investigate the genuineness of certain documents" (Affidavit of Mr. Cheasty, Pet., p. 12a) is not explained. If for no other reason, the "questioned document" evidence should be disregarded for lack of diligence in obtaining it.

Finally, the reports of the document examiner, if critically analyzed, seem to reveal nothing more sinister than that several persons made entries in the diary (Ex. 113) and the batching records (Ex. 488) at various times. From their inherent nature, this is not surprising, and was explained at the trial.

The document examiner apparently was unable to find evidence that any "editorial" or supplemental entries in the diary were entered otherwise than at the date indicated. He carps, however, that making an entry dated on "1/10/64" on the diary page for "12/15/63" was ". . . a violation of instructions printed in the inside of the diary cover. . . ." (Pet., p. 38a). If so, that is a matter going only to the weight of the evidence, does not tend to show fraud, and certainly presents no due process issue to this Court.

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CONCLUSION

Respondent accepted the challenge of the Petition and discussed in detail the many issues set out therein. This is an important substantial case that has "spanned a decade" of controversy and litigation. It is our hope that the length of this brief will not obscure the simple issues and the patent lack of merit in Petitioners' cause.

Petitioners utterly failed to persuade the Oregon appellate Courts of any error in the trial of this hoary cause. They did not timely raise and preserve any federal question below, and have not shown any such question here. Most of the points raised here were urged below and rejected on adequate state grounds. No justification for the failure to discover the so-called "new evidence" on any point, until long after judgment and subsequent to affirmance on appeal, has been shown.

The petition should be summarily denied.

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